Supreme Court, U.S.
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No. 03-0007

IN THE

Supreme Court of the United States

THE REV. DR. MICHAEL NEWDOW, *Petitioner*,

v.

UNITED STATES CONGRESS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN OPPOSITION TO CERTIORARI OR, ALTERNATIVELY, IN SUPPORT OF VACATUR

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QUESTION PRESENTED

In deciding petitioner's appeal, the Ninth Circuit did not address petitioner's claim that the federal Pledge statute, and the recitation of the Pledge under official auspices in various settings, violates his rights as a citizen and taxpayer under the Establishment Clause.

The question presented is:

Whether the Court should review the citizen and taxpayer claims of petitioner that the Ninth Circuit did not address, including his Article III standing to assert those claims and the sovereign immunity issue they present.

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INTEREST OF AMICUS [1]

Americans United for Separation of Church and State is a 75,000-member not-for-profit organization dedicated to defending religious diversity and church-state separation. It advances these goals by speaking out through the media, public forums, and other channels; mobilizing Americans at the grassroots level and through state and regional chapters; advocating for separation of church and state in Congress and state legislatures; and participating in litigation. Americans United was the respondent in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In the past thirty years it has filed or joined amicus briefs in numerous Establishment Clause cases. *E.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Americans United has filed an amicus brief in vided Nos. 02-1574 & 02-1624.

STATEMENT

In his complaint, Newdow alleged Establishment Clause injuries to himself (1) as a parent, as a result of the Pledge policies of his daughter's school district (EGUSD) and another school district (SCUSD), and (2) as a citizen and taxpayer, as a result of the federal Pledge statute, 4 U.S.C. § 4, the recitation of the Pledge under official auspices in various settings, and the publi-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

cation of the Pledge in government documents. See Pet. 3-5. The particulars of Newdow's citizen and taxpayer claims are set forth in the margin.[2] Newdow also alleged that recitation of the Pledge under official auspices violates three provisions of the California Constitution. See Pet. 5 n.1; Compl. ¶¶ 67, 107-08, 118-19. Those provisions are reproduced in the Appendix below.

The school districts moved to dismiss Newdow's complaint, contending, among other things, that Newdow had failed to state a claim and that the Eleventh Amendment barred his claims against them. Their motion was referred to a magistrate, who undertook with the consent of the parties to decide the merits without reaching the school districts' Eleventh Amendment defense or any affirmative defenses that might be asserted by the federal defendants. ER 189-99. Characterizing Newdow's complaint only as challenging the school districts' Pledge policies—and making no mention of Newdow's claims as a citizen and taxpayer or his state-law

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[2] Newdow alleged Establishment Clause injury to himself as a citizen in having to endure the existence of the federal Pledge statute, *e.g.*, Compl. ¶ 62, and the recitation of the Pledge in his presence under official auspices (when he accompanies his daughter to class, *id.* ¶ 80, and when he attends EGUSD and SCUSD meetings, *id.* ¶¶ 85-87). He also alleged that the school districts' Pledge policies effectively foreclose him from serving on the district school boards, *id.* ¶¶ 88-90, and from working for the districts as a teacher, *id.* ¶¶ 120-21. As a taxpayer, Newdow alleged Establishment Clause injury from the expenditure of public funds to pay for the salaries of government employees who recite the Pledge as part of their official duties; to pay for the recitation of the Pledge in public schools; to pay for official events at which the Pledge is recited; and to pay for the printing of the United States Code and other government documents containing the Pledge. *Id.* ¶¶ 109-19.

claims—the magistrate concluded that "the Pledge does not violate the Establishment Clause," and recommended that the complaint be dismissed. App. 111a-12a. The district court adopted the magistrate's report and dismissed the complaint. App. 110a. The Ninth Circuit stated that the district court dismissed the complaint "on the basis of its holding that the school district's policy did not violate the First Amendment." App. 18a.

Newdow appealed the dismissal of his complaint, including his citizen and taxpayer claims and his state-law claims. See Newdow Br. 8 n.12, 15-16, 21-22, 50-51, 54-56, 62; see also US Br. 3-4, 5-7.

In its amended decision, the Ninth Circuit found that Newdow had standing as a parent to challenge EGUSD's Pledge policy, App. 7a, see also *id.* 95a-98a, and it invalidated the policy as impermissibly coercive, App. 11a-17a. The court, however, "decline[d] to reach" the constitutionality of the federal Pledge statute, App. 18a, and it did not address Newdow's other citizen and taxpayer claims or his state-law claims. The court made no finding with respect to Newdow's Article III standing to assert his citizen and taxpayer claims; it also made no finding with respect to the sovereign immunity issue presented by his assertion of an Establishment Clause claim against the United States.[3] The court vacated the dis-

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[3] See Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 5-6 (discussing the sovereign immunity issue). The Ninth Circuit held that Newdow lacked standing to challenge SCUSD's Pledge policy because his daughter did not attend school in that district. App. 7a-8a. With respect to Newdow's challenge to the federal Pledge statute, the court held that the President was not an appropriate defendant and that the Speech and Debate Clause barred Newdow's claim against Congress. App. 5a.

trict court's dismissal of Newdow's complaint only with respect to his challenge as a parent to EGUSD's Pledge policy, App. 18a, leaving undisturbed and unaddressed the district court's dismissal of Newdow's other claims.

Newdow now seeks review of the citizen and taxpayer claims that the Ninth Circuit did not address, including his Article III standing to assert those claims and the sovereign immunity issue presented by his challenge to the federal Pledge statute.

ARGUMENT

I. THE COURT SHOULD DECLINE TO REVIEW NEWDOW'S ESTABLISHMENT CLAUSE CLAIMS AS A CITIZEN AND TAXPAYER BECAUSE THOSE CLAIMS WERE NOT ADDRESSED BELOW.

The Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court," *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988), consistent with its general practice of declining to consider issues that were not decided in the first instance by the court below. See, *e.g.*, *Lee* v. *Kemna*, 534 U.S. 362, 387-88 (2002) ("We ordinarily 'do not decide in the first instance issues not decided below.'") (quoting *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . . ."); Robert L. Stern *et al.*, SUPREME COURT PRACTICE 419 (8th ed. 2002) ("The Court does not sit to resolve issues that might have been but were not considered below.").

This case is particularly ill-suited for review because, in order to reach the merits of Newdow's citizen and taxpayer claims, including his challenge to the federal

Pledge statute, the Court would first have to decide two other issues that both courts below also did not address—Newdow's Article III standing to assert those claims, see *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 471-73 (1982), and the sovereign immunity issue presented by Newdow's assertion of an Establishment Clause claim against the United States, see *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947) (sovereign immunity bars suit against United States absent express waiver by Congress). The Court must decide those issues first because they go to its jurisdiction and that of the courts below to entertain Newdow's claims. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997). The petition therefore potentially requires the Court to decide not one but three issues not decided below. Accordingly, the petition should be denied.[4]

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[4] Newdow does not ask the Court to hold EGUSD's Pledge policy invalid by reason of the invalidity of the federal Pledge statute. The Ninth Circuit properly invalidated EGUSD's policy on the narrower ground that the policy was impermissibly coercive. App. 11a-17a. For this reason the first question in the petition of the United States in No. 02-1574 is far too broadly stated. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (federal courts should "never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (internal quotation marks omitted); *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

II. ALTERNATIVELY, THE COURT SHOULD VACATE AND REMAND FOR CONSIDERATION OF NEWDOW'S CLAIMS BY THE COURT OF APPEALS IN THE FIRST INSTANCE.

A lower court's failure to address a party's claim is not a "compelling" reason for granting review. See Rule 10. If the Court nevertheless concludes that the Ninth Circuit's failure to address Newdow's citizen and taxpayer claims warrants its intervention, the Court should vacate the Ninth Circuit's judgment and remand the case to that court for its consideration of those claims in the first instance. Such a disposition would be consistent with the Court's general practice of not deciding in the first instance matters not addressed below. See, *e.g.*, *Lee*, 534 U.S. at 387-88 (vacating and remanding so that court of appeals could decide petitioner's Due Process claim in the first instance); *Alexander* v. *United States*, 509 U.S. 544, 559 (1993) (vacating and remanding so that court of appeals could decide in the first instance whether challenged federal statute violated the Excessive Fines Clause); *Ins. Co.* v. *Ben Cooper, Inc.*, 498 U.S. 964 (1990) (mem.) (vacating and remanding so that court of appeals could decide jurisdictional issue in the first instance); *Escambia County* v. *McMillan*, 466 U.S. 48, 51-52 (1984) (per curiam) (vacating and remanding so that court of appeals could decide in the first instance a statutory question that could avoid the need to reach a constitutional issue).

If vacatur is ordered, the Court should direct the Ninth Circuit, before it reaches the federal constitutional issue, to consider Newdow's claim that recitation of the Pledge under official auspices violates the California Constitution, see *supra* at 2 & n.2; *infra* Appendix, including whether Newdow is permitted to assert that claim in this federal court action. Disposition of New-

dow's state-law claim on the merits, if the Ninth Circuit concludes that Newdow may assert that claim here, could avoid or limit the need to decide federal constitutional issues here and could also moot vided Nos. 02-1574 & 02-1624. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117-18 & n.28 (1984) (stating general rule, qualified by Eleventh Amendment, that federal court should decide a case on state law grounds if doing so would avoid federal constitutional issue); *Schmidt* v. *Oakland Unified Sch. Dist.*, 457 U.S. 594, 594-95 (1982) (per curiam) (vacating and remanding so that court of appeals could consider in the first instance a state-law question that might avoid need to reach a federal constitutional issue); *Hagans* v. *Lavine*, 415 U.S. 528, 546 (1974) ("The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims.").

As with the novel and unsettled state-law question on which Newdow's Article III standing as a parent depends in Nos. 02-1574 & 02-1624, a GVR directing certification to the California Supreme Court of this state-law question (whether recitation of the Pledge under official auspices violates the California Constitution) is also an option here, if the Ninth Circuit should conclude that Newdow is permitted to assert his state-law claim in this action. See Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 8-9 & n.5.[5]

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[5] In its amicus brief in Nos. 02-1574 & 02-1624, Americans United has suggested the precise question to be certified to the California Supreme Court with respect to Newdow's standing as a parent under California law to challenge EGUSD's Pledge policy notwithstanding the custodial parent's consent to the policy. Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 20.

CONCLUSION

The petition should be denied. Alternatively, the Court should grant the petition, vacate the Ninth Circuit's judgment, and remand the case for consideration of Newdow's citizen and taxpayer claims, including consideration or certification of Newdow's state-law claims.

Respectfully Submitted,

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APPENDIX

CALIFORNIA CONSTITUTIONAL PROVISIONS RELIED ON BY PETITIONER

Article I, § 4:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

Article IX, § 8:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Article XVI, § 5:

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any

city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.